

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

**CACIOPPE COMMUNICATIONS
COMPANIES, INC. D/B/A
POSITIONING SOLUTIONS, INC.¹**

Employer

And

Case 13-RC-21253

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 150**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on October 5, 2004, before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.²

I. Issues

The International Union of Operating Engineers, Local 150 (herein the Petitioner) seeks an election within a unit comprised of all full-time and part-time service and machine control technicians employed by Cacioppe Communications Companies, Inc. d/b/a Positioning Solutions, Inc. (herein the Employer).

The parties submitted two issues to be decided by the Regional Director. The first issue in this case concerns the status of John Benjamin, a service technician, who the Employer contends is a supervisor under Section 2(11) of the Act and should therefore be excluded from any unit found appropriate.

¹ The names of the parties appear as amended at hearing.

² Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The second issue is whether the unit petitioned-for is an appropriate unit under Section 9(b) of the Act. The Petitioner asserts that the petitioned-for unit of service technicians is an appropriate unit. There is no dispute that service technicians should be included in any unit found appropriate. There are four employees in the unit sought by the Petitioner. The Employer contends that the only appropriate unit in this case should also include Michael Salyers, a technical support person, and Ricardo Velazquez, a maintenance employee.

II. Decision

Based on the entire record in this proceeding and for the reasons set forth below, I find that the record fails to establish that John Benjamin is a statutory supervisor as defined by Section 2(11) of the Act as Benjamin exercises none of the indicia of supervisory authority. I also find that Michael Salyers is not so functionally integrated with and do not share such a significant community of interest with the service technicians to warrant their inclusion in the Petitioner for unit. Ricardo Velazquez however, is included in the bargaining unit as a residual employee who would otherwise not be afforded the opportunity to be represented. I, therefore, find that the petitioned-for unit, with the addition of Velazquez, is an appropriate unit under Section 9(b) of the Act and Board precedent.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following bargaining unit:

All full-time and part-time service and machine control technicians, and maintenance employees employed by the Employer at the Employer's facility located at 5410 Newport Drive, Suite 44, Rolling Meadows, Illinois; but excluding managers, office clerical employees and guards, professional employees, supervisors as defined in the Act.

The unit found appropriate herein consists of five employees.

III. Facts

The Employer is engaged in the business of providing technically advanced products to the surveying and construction industries. The Employer has facilities located in Rolling Meadows, Illinois; Niles, Michigan; Indianapolis, Indiana; Milwaukee, Wisconsin; and St. Louis, Missouri. The instant case involves the employees who work in the service and repair department at the Employer's Rolling Meadows facility.

The Employer, Positioning Solutions Company, is the result of a May 2004 merger between two companies, G. Lengemann Company (herein Lengemann) and Laser Source, Inc. (herein Laser Source). Historically, Lengemann provided surveying equipment and products from its facility in Elk Grove Village, Illinois, and Laser Source provided construction laser systems from its facility in Rolling Meadows. The merger provided a way for the two companies to integrate products and services for use by surveying and construction industries and to provide comprehensive productivity solutions to professionals in both industries. In August 2004, the Employer closed what was formerly the Lengemann facility in Elk Grove

Village and moved those operations into the Rolling Meadows facility where the Employer currently exists. Due to the fact that the current facility is leased and not large enough for the merged operations, the Employer is currently in the process of looking for a new facility to purchase.

The Employer's in-house service and repair facility, where the petitioned-for unit employees work, was initially created by Laser Source prior to its 2004 merger with Lengemann. Jerry Bickner, currently the owner, President, and Chief Operating Officer of Positioning Solutions Company, was one of three founders of Laser Source. When Laser Source decided to perform product repairs in-house, Bickner hired John Benjamin as the service manager in 1994 or 1995 to perform the repair work and set up the service department at Laser Source. At that time, Benjamin's responsibilities included fixing lasers, organizing and establishing repair, ordering, and billing procedures, and providing feedback to Bickner regarding the needs of Laser Source's new service department. During his tenure as the service manager for Laser Source, Benjamin suggested the hire of service technicians on three occasions, and then brought to Bickner's attention the problems with two of these employees who Bickner eventually discharged. At no time during his tenure with Laser Source did Benjamin independently hire, fire or discipline any employees, as this was done only by Bickner.

Since the merger of the two companies, Benjamin has had no role in hiring or firing any employees in the Employer's service department. Benjamin has no input on the salaries or wages of other service technicians, develops no written policies or procedures for use in the service department, does not set service technicians' work schedules, and does not decide which employees will receive certain training. Such decisions are solely at the discretion of Bickner and other owners of the company. Since the merger, the Employer has not reconfirmed that Benjamin is still the service manager, and has since announced that another individual named Russell³ would be the service manager for Rolling Meadows.

All service technicians, including Benjamin, repair lasers and automated machine control systems and order parts as needed for their individual projects. The formal education level of Benjamin and the service technicians do not exceed beyond high school diplomas and various technical school degrees or on-the-job training. Although Benjamin keeps track of service technicians' vacation schedules and other planned absences on his calendar, he does not have authority to grant time off, as all service department employees schedule time off with the office manager.

Service technicians, including Benjamin, are generally able to repair a variety of products, but each technician has a product he is accustomed to repairing and will typically receive assignments based on this. For example, when it comes to fieldwork, Benjamin's focus is on older equipment in the field and limited GPS systems, whereas service technician Larry Penning's expertise is in the new installation of GPS systems and automated machines. Service technicians receive their assignments from Bickner or a salesman or anyone who needs a product repaired, including Michael Salyers, the Employer's technical support person. Service technicians often get their own work assignments by going to the repair shelf and selecting a

³ Neither party stated Russell's last name during the hearing—only that he was from Niles facility.

product to repair. When choosing a product to repair on his own, the service technician is not required to obtain permission or approval from anyone prior to selecting and beginning a repair and does not have to report to anyone what products he is working as it is assumed that every technician knows what he is doing. Each repair job comes with its own set of paperwork, and when the repair is completed, each service technician types an invoice for the work done and submits it to the office manager for billing. The Employer keeps record of all invoices completed by each technician. Occasionally, a customer may telephone the service department regarding the status of their equipment being repaired. If Benjamin answers the call, he will simply notify the service technician who is working on that customer's equipment and that service technician will then contact the customer with the requested information.

The service technicians work from 8:00 a.m. to 4:30 p.m., although Benjamin works 6:30 a.m. to 3:30 p.m., and no overtime is worked by anyone without prior arrangement with Bickner. Each service technician is paid a salary ranging from approximately \$21,000 to \$48,000 depending on their experience and tenure with the company. Benjamin has the highest salary at \$ 48,000. Service technicians like Benjamin and Penning who perform fieldwork are provided with a company car. All service technicians receive health insurance benefits, paid holidays, and paid vacation and sick days. All technicians ultimately report to Bickner, although they may occasionally refer to Benjamin with questions on repair jobs.

In addition to the four service technicians, two other employees who work out of the Employer's Rolling Meadows facility are at issue in this case: Michael Salyers and Ricardo Velazquez. Salyers, the technical support person, is an expert in robotic total stations and works with customers in application of GPS systems. When a GPS product arrives at the Employer's facility, Salyers unpacks it, assembles it, and programs the different software programs that the product is supposed to have. Once the GPS product is deemed functional, Salyers or a salesman will deliver the product to the customer. However, when products other than GPS systems come into the Employer's facility, such as pipe lasers or rotating lasers, the service technicians prepare these lasers for distribution to customers by installing batteries, checking the calibration, and testing the lasers for functionality.

Prior to the merger, Salyers also worked for Laser Source, providing his expertise in upper level software for surveying product lines and selling such products to surveyors. After the merger, Salyers became less involved in sales and became the technical support person because Lengemann already had a survey salesman. Since then, Salyers no longer works a specific territory or has a prospecting routine as he did when he was in sales and is now involved with the installation and program training for new customers. As the technical support person, Salyers helps customers diagnose machine malfunctions and performs all electronic computerized programming repairs. If it is determined that a product has a component problem, Salyers refers such repairs to service technicians.

Salyers is paid a salary and a commission that is approximately three times the salary of service technicians and this is largely due to his software and programming abilities that the service technicians do not have.⁴ Salyers does not work a set schedule. Unlike the service

⁴ Alex Patrickus' gross income was approximately \$21,000 and Tom Bergloff's gross income was approximately \$22,000. Salyers' gross income was approximately \$59,000.

technicians, Salyers holds a dual four-year college degree in engineering and surveying. Salyers reports only to Bickner and never to anyone in the service department. On any given week, Salyers interacts with service technicians about once or twice a week, typically when he has a mechanical repair that needs to be done. Salyers spends his time either in his office at the Employer's facility programming or on-site with customers working on their systems. The work done by Salyers and the service technicians cannot be interchanged.

As the maintenance employee, Ricardo Velazquez's primary duties involve cleaning the Employer's Rolling Meadows facility. Velazquez cleans the offices, takes out the garbage, and cleans the floors. His involvement with the service department entails cleaning the mud and dirt on machines that come into the service department for repair and sorting products on the shelves so that the more experienced service technicians do not have to spend time cleaning. Unlike the service technicians and Salyers, Velazquez is an hourly employee who works only a part-time schedule of about 21 hours per week and receives no health benefits or paid vacation or sick days.⁵ Velazquez reports directly to the office manager and does not report to anyone else, including Bickner. The only interaction that technicians have with Velazquez is when they have equipment that needs to be cleaned. Velazquez does not have skills that allow him to perform any of the duties of the technicians.

IV. Analysis

A. Whether John Benjamin is a Section 2(11) Supervisor

The Act expressly defines the term "supervisor" in Section 2(11), which provides:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend lay off, recall promote, discharge, assign reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
29 U.S.C. § 152(11).

The Supreme Court has interpreted the text of the above-quoted statute to set forth a three-part test for determining supervisory status. *N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13 (2001), citing, *N.L.R.B. v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994). Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." *Id.* While the Board has reasonable discretion in interpreting whether the degree of judgment exercised in one of the 12 categories falls within the "routine" or "clerical" category, once the Board has determined that the judgment exercised is independent in nature, the individual in question is deemed to be a supervisor under

⁵ According to the Employer, Velazquez's gross income was approximately \$9,000.

Section 2(11) of the Act. *Kentucky River*, 532 U.S. at 717. Finally, the burden of proving supervisor status rests solely upon the party claiming it. *Id.* at 711.

Applying the above principles to the facts of the case before me, I find that the Employer has not met its burden of proving that John Benjamin is a supervisor within the meaning of Section 2(11) of the Act. Although Benjamin's work has not changed significantly since the merger, his day-to-day duties and responsibilities do not set him apart significantly from other service technicians in his department. First, the record is clear that Benjamin has no authority to hire, fire, or discipline employees. The Employer directs the record to Benjamin's history with Laser Source, during which Benjamin was employed as the service manager and provided Bickner with some input on the hiring and firing of certain employees. However, Benjamin's role at Laser Source is not relevant to the finding here as Laser Source is no longer the Employer. Even assuming *arguendo* that Benjamin's history at Laser Source was applicable here, the record shows that Benjamin had no authority to independently hire, fire, or discipline any employees at Laser Source. Second, Benjamin does not have the authority to grant service technicians time off from work or to excuse their absences, as this is done through the office manager and the owner Jerry Bickner.

The Board has consistently held that routine assignments to certain employees are not exercises of independent judgment sufficient to confer supervisory authority on an individual. The Employer failed to prove that Benjamin exercises independent judgment in directing other employees and in other aspects of his duties. The record shows that the assignments given to the service technicians are typically based on the products that need to be repaired, the expertise of each technician in repairing certain products, and the time target for each repair. Service technicians often choose their own assignments to work on from the repair shelf, and the record shows that this is the most common way in which service technicians receive their work. The record also is clear that on the occasions when service technicians receive their work assignments from someone else in the company, whether from Bickner or a salesman, their assignments are simply based on the service technician's specific area of repair expertise and the customer's need. Further, although Benjamin has the ability to order parts and minor tooling needed for repairs, the record showed that other technicians also have the same ability.

Next, aside from the fact that Benjamin does not view himself as having any supervisory authority within the service department, the record shows that other bargaining members do not view Benjamin as a supervisor. Further, although Benjamin is paid a higher salary than the other technicians, I find that this is simply a result of his long-standing tenure with the Employer, first with Laser Source and currently with Positioning Solutions Company, and the fact that Laser Source, prior to its 2004 merger, needed someone of his skill level and experience with certain types of equipment repair to establish the service department. Finally, although Benjamin still has old business cards from Laser Source that state he is the service manager, he has neither received new cards from Positioning Solutions, Inc. indicating that he is still the service manager or been given any confirmation from the Employer since the merger. Benjamin's own view is that the title of service manager he may still have is meaningless and "ceremonial" in nature, and I agree with this view in light of the fact that at a meeting prior to the merger, the Employer announced to everyone that another individual from another facility would become the new service manager in Rolling Meadows.

Accordingly, I find that Benjamin exercises none of the hallmark factors that the Board considers in determining whether an individual is a supervisor, and thus, is properly included in the petitioned-for unit.

B. Whether the Petitioned-for Unit is Appropriate under Section 9(b) of the Act

The Act does not require that the bargaining unit be the *only* appropriate unit, or the *ultimate* unit, or even the *most* appropriate unit; the Act only requires that the petitioned-for unit be an appropriate one, such that employees are insured “the fullest freedom in exercising the rights guaranteed by this Act.” *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Tallahassee Coca-Cola Bottling Co.*, 168 NLRB 1037 (1967); *Morand Beverage Co.*, 91 NLRB 409 (1950) enf’d. 190 F.2d 576 (7th Cir. 1951). Thus, there is more than one way in which employees of a given employer may appropriately be grouped for purposed of collective bargaining. *Rohtstein Corp.*, 233 NLRB 545, 547 (1977).

The Board’s procedure for determining an appropriate unit is to first examine the petitioned-for unit. See, e.g., *The Boeing Co.*, 338 NLRB 152, 153 (2001). The burden is on the party challenging the unit to show that the petitioned-for bargaining unit is inappropriate; if the unit sought by the petitioning labor organization is appropriate, the inquiry ends. *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988). It is well settled that the unit need only be an appropriate unit, not the most appropriate unit. *Id.*; see also *Phoenix Resort Corp.*, 308 NLRB 826, 827 (1992). A unit is appropriate where employees in the unit have a separate community of interest from other job classifications and in determining this community of interest, the Board examines such factors as wages, hours and working conditions, commonality of supervision, degree of skill and common functions, frequency of contact and interchange with other employees, and functional integration. *Boeing Co.*, 337 NLRB at 153.

Upon the record evidence in this case, I find that the petitioned-for unit constitutes an appropriate unit for the purposes of collective bargaining. After considering factors such as Salyers’ job functions, skills, and compensation, *inter alias*, as set forth in the record, I find that Salyers shares little community of interest with the service and machine control technicians and that his interaction with the petitioned-for unit is minimal at best. While the work functions of the technical support person are integral to the operation of the Employer’s business and the service department, the record fails to establish that the absence of Salyers would necessarily mean that the service department would fail to function. The fact that an insufficient community of interest exists between Salyers and the technicians is shown by a number of factors in the record. First, Salyers’ salary is almost triple than that of two of the technicians and derives one-third of his salary from commissions. Service technician Penning used to receive a \$150 commission for any new machine installations he performed, but the Employer discontinued Penning’s commission since August 2004. Second, while technicians work a set schedule and overtime is only available to them by arrangement, Salyers has no set schedule or hours. Third, although the Employer contends that technicians report to Benjamin, whereas the Petitioner posits that technicians all individually report to Bickner, there is no dispute that Salyers reports only to Bickner and has never reported to anyone else. Fourth, Salyers’ education level far exceeds that of any of the technicians, including Benjamin and his degree of technical expertise

is one that is not on par with the service technicians. The service technicians do not have the skills required to perform Salyers job and the jobs of the service technicians and Salyers clearly cannot be interchanged. Finally, although there may be situations where Salyers and a technician may both work on a product to prepare it for distribution to a customer, the record fails to show that the technician cannot carry out its duties in the absence of Salyers.

Based on the record evidence, I find that it would be appropriate to include Velazquez in the bargaining unit. Although Velazquez and the service technicians are separately supervised, Velazquez works in closer proximity to the service department than he does to the office clericals. Velazquez prepares equipment that comes in for repair by cleaning and sorting them for the service technicians and cleans the areas in which the service technicians work. While the record indicates that interaction is minimal between Velazquez and the service technicians due to a language barrier, the interaction that they share is primarily focused on the work that Velazquez does in the service department. If nt included as part of the petitione-for unit, Velazquez would constitute a residual unit of one employee, a result the Board has long found to be undesirable. See, e.g., *North Jersey Newspapers*, 322 NLRB 394, 396 (1996); *Gateway Equipment Co.*, 303 NLRB 340, 342 (1991).

Accordingly, I find that the unit as petitioned-for with the addition of maintenance employee Velazquez, constitutes an appropriate unit under Section 9(b) of the Act and direct an election in that unit.

V. Summary

Based on the foregoing and the entire record herein, I find that (1) the unit as petitioned-for is an appropriate unit consisting of service technicians and the maintenance employee only; and (2) service technician John Benjamin lacks any of the requisite indicia of supervisory authority under Section 2(11) of the Act are is therefore properly included in the petitioned-for unit.

VI. Direction of Election

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strikes who have retained their status, as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the

election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

VII. Notices of Election

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VIII. List of Voters

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, Suite 800, 200 West Adams Street, Chicago, Illinois, 60606 on or before October 27, 2004. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

IX. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **November 3, 2004**.

DATED at Chicago, Illinois this 20th day of October 2004.

/s/Roberto G. Chavarry

Regional Director

National Labor Relations Board

Region 13

200 West Adams Street, Suite 800

Chicago, Illinois 60606

CATS — Voter Eligibility – Statutory Exclusions (Supervisors); Unit – Other Scope/Definition;
Unit - Residual

177-8520-0000-0000

817-8150-7727-0000

737-2850-1185-0000

737-7024-9500-0000

H:\R13COM\Regional Document Archive\Pre-election decisions\RC-21253.doc 10/20/2004 10:35 AM